prosperity, and hence where a policy on his life for its benefit was a bona fide transaction, consummated with the honest purpose of protecting the corporation against loss in the event of his death, it was not obnoxious to public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.* 7 Va.-W. Va. Enc. Dig. 776.

For other definitions, see Words and Phrases, vol. 4, pp. 3670-3674; vol. 8, p. 7690.]

Error to Circuit Court of City of Alexandria.

Action by the Board, Armstrong & Co. Corporation against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

*John M. Johnson,* of Alexandria, for plaintiff in error.

*S. G. Brent,* of Alexandria, *Chas. E. Plummer,* of Petersburg, and *C. E. Nicol* and *Gardner L. Boothe,* both of Alexandria, for defendant in error.

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## CHESAPEAKE & O. RY. CO. *v.* SWARTZ.

Nov. 20, 1913. On Petition to Rehear, Jan. 15, 1914.

[80 S. W. 568.]

**1. Master and Servant (§§ 260, 261*)—Declaration—Affirmative Defense.**—Assumption of risk and contributory negligence, being matters of defense, need not be negatived by the declaration.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848, 849-854; Dec. Dig. §§ 260, 261.* 9 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 697; 15 Va.-W. Va. Enc. Dig. 657.]

**2. Pleading (§ 193*)—Declarations—Sufficiency.**—Where plaintiff's declaration in a negligence case affirmatively shows that he assumed the risk or was guilty of contributory negligence, it is demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.* 10 Va.-W. Va. Enc. Dig. 397; 14 Va.-W. Va. Enc. Dig. 770; 15 Va.-W. Va. Enc. Dig. 729.]

**3. Master and Servant (§ 180*)—Injury to Railroad Employee—Fellow Servants.**—Under the express provisions of Const. § 162, it could not be set up as a defense in a car repairer's action for injuries from the negligent moving of a car beneath which he was working that the persons in charge of the engine and causing the movement were plaintiff's fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.* 6 Va.-W. Va. Enc. Dig. 19; 14 Va.-W. Va. Enc. Dig. 440; 15 Va.-W. Va. Enc. Dig. 397.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

**4. Master and Servant (§ 258*)—Injury to Railroad Employee—Declaration—Sufficiency.**—Where the declaration, in a car repairer's action for injuries from the negligent moving of a car beneath which he was working, alleged the existence of the relation of master and servant, the duty owing from defendant to plaintiff in the premises, and the negligent breach of duty by defendant's employees in charge of the locomotive which caused the car to move, it was not demurrable on the ground that it showed no neglect of duty or actionable negligence on the part of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.* 9 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 697; 15 Va.-W. Va. Enc. Dig. 657.]

**5. Pleading (§§ 192, 313*)—Bill of Particulars—Duty to Request.**—Where a declaration states a good cause of action and defendant desires a more particular statement thereof, he cannot demur for want thereof, but should demand a bill of particulars under Code 1904, § 3249.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427, 949; Dec. Dig. §§ 192, 313.* 2 Va.-W. Va. Enc. Dig. 376; 14 Va.-W. Va. Enc. Dig. 153; 15 Va.-W. Va. Enc. Dig. 121.]

**6. Pleading (§ 237*)—Amendment—Curing Variance.**—Under Code 1904, § 3384, authorizing amendments to avoid a variance on such terms as to costs or continuance, as may be just, it was not error for the court at the trial to send the case back to rules, with leave to there amend the declaration so as to permit the introduction of evidence excluded because of variance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.* 1 Va.-W. Va. Enc. Dig. 344; 14 Va.-W. Va. Enc. Dig. 45; 15 Va.-W. Va. Enc. Dig. 42.]

**7. Evidence (§ 389*)—Parol Evidence—Railroad Rules.**—In a car repairer's action for injuries from the negligent moving of a car under the directions of a hostler, parol evidence, though inadmissible to vary the terms of an unambiguous rule of the railroad company designed to protect workmen at work under a car, was admissible to show that such rule had never been in force, or had been modified, at the place of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1717, 1718; Dec. Dig. § 389.* 10 Va.-W. Va. Enc. Dig. 682; 14 Va.-W. Va. Enc. Dig. 804; 15 Va.-W. Va. Enc. Dig. 767.]

**8. Evidence (§ 368*)—Impeachment—Contradictory Statement.**—In a negligence case the court properly required defendant to produce a contemporaneous written statement made by an employee concern-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ing the accident; the statement being admissible in evidence to impeach the testimony given by such employee on the trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 444, 1540-1558; Dec. Dig. § 368.* 11 Va.-W. Va. Enc. Dig. 379; 15 Va.-W. Va. Enc. Dig. 830.]

**9. Appeal and Error (§ 1050*)—Harmless Error—Evidence.**—In a railroad employee's action for injuries, the admission in evidence of a contemporaneous written statement made by defendant's witness concerning the accident, if error, was not prejudicial to defendant, where such statement would tend to corroborate, and not to contradict, the witness' testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.* 1 Va.-W. Va. Enc. Dig. 592; 14 Va.-W. Va. Enc. Dig. 92; 15 Va.-W. Va. Enc. Dig. 68.]

**10. Master and Servant (§ 180*)—Injury to Railroad Employee—Control of Engine.**—Where a car repairer while working beneath a car was injured from a movement of the car due to acts of the engineer and fireman of a locomotive, which acts were done under the direction of a hostler who knew that the train was protected by blue lights, the railroad company was liable on the theory that the hostler had assumed charge of the engine, and that the movement of the car was his personal act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.* 6 Va.-W. Va. Enc. Dig. 23; 14 Va.-W. Va. Enc. Dig. 440; 15 Va.-W. Va. Enc. Dig. 397.]

**11. Appeal and Error (§ 1002*)—Verdict—Conflicting Evidence.**—On appeal from a judgment rendered for plaintiff on a verdict resting on conflicting evidence, the case must be considered as upon a demurrer to the evidence by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.* 1 Va.-W. Va. Enc. Dig. 576; 14 Va.-W. Va. Enc. Dig. 90; 15 Va.-W. Va. Enc. Dig. 65.]

**12. Damages (§ 132*)—Personal Injuries—Excessive Recovery.**—Where a car repairer's jacket was caught under the car wheel by negligent moving of the car, and he was dragged several feet and well-nigh choked to death, and the bone of his right leg was crushed and the flesh torn, which injuries caused him to be confined 17 months in the hospital and undergo several operations, and resulted in a running sore and diseased condition, which might necessitate amputation, and compelled him to give up work, and impaired his general health, a recovery of $17,000 was not excessive, where at the time of the accident he was a robust man 20 years of age, earning from $65 to $70 per month.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.* 4 Va.-W. Va. Enc. Dig. 204; 14 Va.-W. Va. Enc. Dig. 304; 15 Va.-W. Va. Enc. Dig. 253.]

On Petition to Rehear.

**13. Master and Servant (§ 258*)—Injury to Car Repairer—Petition.**—Where a count, in a petition in a car repairer's action for injuries from the moving of cars in violation of the blue-light rule, alleged that throughout plaintiff's term of service he had been informed and instructed by the defendant that the true construction of the rule or the habitual practice of the company for the protection of trains was that no cars should be moved without notice after the blue lights were placed, and that this construction and practice had been observed and acted upon during plaintiff's entire service, and that defendant during such time had taken no steps to require any other observations of the rule, it was not objectionable as involving a construction of the rule, but was an averment of a modification or partial abrogation thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.* 9 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 697; 15 Va.-W. Va. Enc. Dig. 657.]

**14. Master and Servant (§ 259*)—Injury to Car Repairer—Petition—Sufficiency to Charge Actionable Negligence.**—A count of the complaint, in a car repairer's action for injuries from the negligent moving of cars with an engine managed by a fireman under the direction of a hostler, sufficiently charged the liability under the constitutional fellow-servant provision (Const. 1902, § 162), where it charged that the injury sustained was occasioned by the negligence of a hostler, a fellow servant in charge of a locomotive, though it did not allege that the hostler had power to delegate the performance of his duties to the fireman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 837-843; Dec. Dig. § 259.* 9 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 697; 15 Va.-W. Va. Enc. Dig. 657.]

**15. Master and Servant (§ 185*)—Injury to Car Repairer—Safe Place to Work—Neglect of Nonassignable Duty.**—The duty owed by a railroad company to a car repairer to furnish him a reasonably safe place in which to work is nonassignable; and hence the omission of a hostler to discharge his duty relative to moving cars beneath which a car repairer was working constituted negligence for which the railroad company was liable, though the cars were actually moved by a fireman under the hostler's direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.* 9 Va.-W. Va. Enc. Dig. 670; 14 Va.-W. Va. Enc. Dig. 686; 15 Va.-W. Va. Enc. Dig. 646.]

**16. Negligence (§ 58*)—"Proximate Cause."**—"Proximate cause" is that which, in a natural and continuous sequence unbroken by any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

new cause, produces an event, and without which the event would not have occurred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. § 58.* 10 Va.-W. Va. Enc. Dig. 372; 14 Va.-W. Va. Enc. Dig. 766; 15 Va.-W. Va. Enc. Dig. 722.]

**17. Trial (§ 252*)—Instructions—Evidence to Support.**—Where, in a car repairer's action for injuries from the negligent moving of cars, the undisputed evidence showed that plaintiff went under the car in the proper discharge of his duties and in obedience to the express command of the car inspector whose orders he had been specifically directed to obey, an instruction, that he could not recover if he could have avoided the accident by waiting until the engine was uncoupled, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505-596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

**18. Trial (§ 260*)—Refusal of Instructions Covered.**—A requested instruction substantially covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.* 7 Va.-W. Va. Enc. Dig. 742; 14 Va.-W. Va. Enc. Dig. 565; 15 Va.-W. Va. Enc. Dig. 521.]

Error to Circuit Court of City of Clifton Forge.

Action by D. H. Swartz against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

*J. M. Perry,* of Staunton, for plaintiff in error.

*W. E. Allen,* of Mineral Wells, and *Chas. & Duncan Curry,* of Staunton, for defendant in error.

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## LEWIS *v.* COMMONWEALTH.

Jan. 15, 1914.

[80 S. E. 575.]

**Gaming (§ 98*)—Criminal Prosecutions—Evidence.**—Under Code 1904, § 3815, forbidding the keeping or exhibiting of a gaming table, commonly called A B C or E O table, faro bank, wheel of fortune, keno table, or table of the like kind under any denomination, whether the game or table be played with cards, dice, or otherwise, where the warrant under which accused was tried charged the keeping and exhibiting of a crap table in the nature of an A B C or E O table, proof was necessary that the game of crap was of a like kind with those enumerated in the warrant, and hence a conviction could not

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.